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* ADMITTED TO PRACTICE IN
COLORADO, UTAH AND HAWAII

Telluride
November 29, 2003

Hon. Vernon Williams, Secretary
Surface Transportation Board
1925 K Street, N.W.
Suite 700
Washington DC 20423-0001

ENTERED
Office of Proceedings

DEC 01 2003

Part of
Public Record

Re: Docket No. AB 33 (Sub-No. 132X)

Dear Secretary Williams:

This transmits a Supplemental Update to the City of Creede's November 14, 2003 Submission of Materials. The attachment to this Supplemental Update, consisting of a November 26, 2003 letter from Union Pacific, was not available at the time of the City's November 14, 2003 filing.

Thank you for your attention to this matter.

Yours very truly,


George M. Allen

cc: Thos. McFarland, Esq.
Robert T. Opal, Esq.
Raymond P. Micklewright, Esq.
Hon. B. J. Myers, Mayor of Creede

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**BEFORE THE SURFACE TRANSPORTATION BOARD
OF THE UNITED STATES**

**UNION PACIFIC RAILROAD
COMPANY - ABANDONMENT
EXEMPTION - IN RIO GRANDE
AND MINERAL COUNTIES, CO**

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**DOCKET NO. AB-33
(SUB-NO. 132X)**

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**CITY OF CREEDE'S SUPPLEMENTAL UPDATE
TO SUBMISSION OF MATERIALS**

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The City of Creede, Colorado, by its attorney, George M. Allen, hereby makes this Supplemental Update To Its Submission of Materials.

Introduction

The City Of Creede filed substantial materials on November 14, 2003, resulting in the Board's Order to conduct this proceeding to determine whether the Denver & Rio Grande Railway Historical Foundation, Inc. made false and/or fraudulent financial representations to the Board to obtain Offer of Financial Assistance Rights to the Creede Branch of the former Denver & Rio Grande Railroad in Rio Grande and Mineral Counties, Colorado.

In its November 14, 2003 filing the City of Creede submitted information to the Board indicating that the Foundation's President and Executive Director, Donald Shank, had stipulated in the federal district court proceeding which led to referral of this matter to the Board that as of September 24, 2001, Mr. Shank could not make good his personal \$400,000 financial guaranty to the Foundation for the Foundation's obligation to complete payments to Union Pacific for purchase

of the right of way. (Record, page 307).

At his August 3, 2001 deposition, Mr. Shank testified that he did not have funds with which to make good the guaranty. (Transcript of August 3, 2001 Shank deposition; Record pages 241 and 242). At that time payments were coming due to Union Pacific in September, 2001 (Record, pages 241 and 242).

Subsequent to the City's November 14, 2003 filing in the Board, the undersigned made inquiry of Union Pacific's legal department, to determine the present status of the Foundation's payments to Union Pacific for the Foundation's purchase of the right of way. Here is the inquiry made to the Union Pacific:

November 14, 2003

By UPS
Tracking Number 7115 014 539 3

Robert T. Opal, Esq.
Law Department
Union Pacific Railroad
1416 Dodge Street, Room 830
Omaha NE 68179-0001

Re: Surface Transportation Board
STB Finance Docket No. 34376
Docket No. AB-33 (Sub-No. 132X)

Dear Mr. Opal:

This requests that you furnish to me, in my capacity as the legal counsel of record for the Petitioner City of Creede in the referenced proceeding, an answer to the question set forth below and copies of the documents requested below:

Question

What is the status of payment(s) by the Denver & Rio Grande Railway Historical Foundation, Inc. (the Foundation) to the Union Pacific Railroad for

purchase of the right of way from Derrick, Colorado to Creede, Colorado?

1. Have all payments due to Union Pacific by the Foundation been paid?
2. If the answer to A is affirmative, what amounts were paid on what dates?
- C. If the answer to B [A] is negative, what amounts are still owed and what are the scheduled dates of anticipated payment?
- D. Has Union Pacific written off (within the meaning of Generally Accepted Accounting Principles as promulgated by the American Society of Certified Public Accountants) any part of payment(s) owed to Union Pacific by the Foundation, and, if so, when, for what amounts and under what circumstances?

Documents

1. We request that you furnish us with copies of any and all documents and/or records of communications (such as telephone memos) which have gone back and forth between Union Pacific and the Foundation and/or its Chief Executive Officer, Donald Shank, since September 24, 2001 (the date on which Mr. Shank stipulated in United States District Court in Denver that he was unable to make good his personal guaranty of \$400,000.00 to the Foundation to support purchase of the right of way), through the date of your response to this letter.
2. We request that you furnish us with copies of all internal Union Pacific records pertaining to the financial transactions involving Union Pacific and the Foundation relating to payment(s) and/or lack of payment(s) by the Foundation to Union Pacific for purchase of the right of way from Derrick, Colorado to Creede, Colorado.

Attached to this filing is a copy of the November 26, 2003 letter of Robert T. Opal, General Commerce Counsel of Union Pacific, indicating that the \$274,616, which was due to Union Pacific and unpaid at the time of the August 3, 2001 Shank deposition and still unpaid at the time of the September 24, 2001 Shank stipulation in the District Court, remains unpaid to this date and that

Union Pacific has apparently agreed to further postpone receipt of the \$274,616 to at least March 2, 2005 and September 2, 2005. As his letter indicates, Mr. Opal has vehemently declined to provide further information regarding the communications and other records associated with Union Pacific's agreed postponement of receipt of the amount agreed to be paid by the Foundation to Union Pacific in 1999 and 2000.

Discussion

The City of Creede is distressed that the Foundation and the selling railroad (which has since sold off its entire network of trackage connecting the Creede Branch to the rest of its system) have entered into agreements by which the Foundation is in effect able to speculate in the right of way as a real estate opportunity, with its obligation to make payment deferred to a date more than five years after the award of OFA rights, so, unless this Board revokes the Foundation's OFA rights (aw Creede believes the Board should do) the Foundation will apparently be able to sell part or all of the real estate obtained through the OFA process.

The portent of the precedent which could be set, if the Board allows the OFA rights of the Foundation to remain intact, is chilling indeed. It is a portent that other parties may use the OFA process to purchase rights of way on a speculative basis, with no obligation to settle up with selling railroads until a point in time after the expiration of five years from date of sale, so as to ultimately make payment with proceeds of sales of the rights of way by the OFA recipients.

In short, if the process being used by the Foundation and Union Pacific gains the sanction of the Board in this proceeding, the door will be open to an OFA recipient to buy a right of way, utterly fail to operate rail service on it, and then, after expiration of five years, "flip" the real estate

or part of the real estate to a new buyer and use the proceeds of that sale to settle up with the selling railroad.

In this case it is noteworthy that while part of the Creede Branch is land used by the Union Pacific and its predecessors by filings made under the General Railway Act of 1875, and thus subject on abandonment or rail-banking to the reversion provisions in 43 U.S.C. §912, a substantial part of the right of way (we estimate about seven out of 19 miles) is fee land, which will become an outright possession of the Foundation in May, 2005 if the Board does not revoke the OFA rights the Foundation obtained in the 1999 and 2000 proceedings.

The materials filed by Creede on November 14, 2003 already demonstrate with blinding clarity that a main component of the Foundation's activity after acquisition of the Creede Branch was to go into the real estate leasing business and to exact payments from persons and businesses which had operations or buildings on the right of way. (Record, pages 69-86 and page 104).

Conclusion

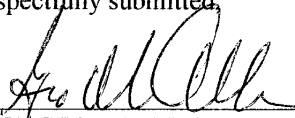
The attached letter of Union Pacific's Mr. Opal shows that the Foundation continues to be unable to pay for the right of way, so that the Foundation, which has yet to take any meaningful step toward providing rail service other than the cosmetics of a website and accumulation of some obsolete cars and maintenance equipment, and which has never been able to address the multi-million dollar cost of restoration of roadbed and tracks which were already in untenable condition when service ceased almost 20 years ago, is now on a course to pay Union Pacific only at a date *after* the expiration of the five years from grant of OFA rights, so it is postponing its only substantial documented financial obligation to a point at which it can go beyond real estate leasing into actual

real estate sales as a means of profiteering on its OFA rights.

Thus the procedure which is actually being used by the Foundation in this matter, will, if sanctioned by the Board, turn OFA purchases into outright land speculations and will completely vitiate the purposes of the Congress in providing for OFA procedures.

Creede continues to maintain that the evidence newly discovered in the District Court proceedings requires that the OFA rights granted to the Foundation be revoked.

Respectfully submitted,



GEORGE M. ALLEN
Counsel for City of Creede

CERTIFICATE OF SERVICE

I hereby certify that I have, at Telluride, Colorado this 29th day of November, 2003, served a true copy of the documents denominated below on the parties and/or counsel listed below by the means of service shown below:

Documents Served

CITY OF CREEDE'S SUPPLEMENTAL UPDATE TO SUBMISSION OF MATERIALS

Means of Service

- ☒ U.S. Mail, Postage Prepaid
- ☐ Overnight Courier
- ☐ Hand Delivery

Agencies, Persons and/or Counsel Served

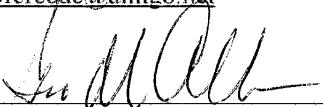
Hon. Vernon Williams, Secretary
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Robert T. Opal, Esq.
Law Department
Union Pacific Railroad
1416 Dodge Street, Room 830
Omaha NE 68179-0001

Hon. B. J. Myers
Mayor
City of Creede
P.O. Box 457
Creede CO 81130
Telephone: 719-658-2276
Facsimile: 719-658-2017
cityofcreede@amigo.net



George M. Allen

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UNION PACIFIC RAILROAD COMPANY

Law Department



1418 DODGE STREET
ROOM 930
OMAHA, NEBRASKA 68179-0001
FAX (402) 271-5610

November 26, 2003

**Via Fax (970) 369-1009 and
First Class Mail**

George M. Allen, Esq.
206 Society Drive
Telluride, CO 81435

RE: STB Docket No. AB-33 (Sub-No. 132X), Union Pacific Railroad
Company – Abandonment Exemption – In Rio Grande and Mineral
Counties, CO

Dear Mr. Allen:

This refers to your letter of November 14, 2003 requesting that I furnish you with certain information by "a week from next Tuesday, November 24" (i.e., December 2)

I am, frankly, puzzled by your request. You state that you desire the requested information "in order to make appropriate use of [this] information in the STB's proceedings relevant to our request that the OFA rights obtained by the Foundation be rescinded..." However, you have already made the only evidentiary submission you are permitted to make in the "rescission" proceeding under the Board's Rules of Practice. That was the "City of Creede's Submission of Materials Compiled During U.S. District Court Proceedings" filed October 14, 2003 (which the Board, in its decision served November 3, 2003, treated as a petition to reopen). The Foundation and UP are permitted to submit a reply to the City's submission, and the record is then closed. The City is not permitted to submit a reply to these replies, see 49 C.F.R. 1104.13.

Nevertheless, without waiving any objections UP may have to discovery, we are responding as follows:

Question

The agreed purchase price for the sale of the Creede line to the Foundation was \$624,616, which was settled at closing as follows:

Cash paid by Foundation to UP..... \$350,000

Note by Foundation to UP..... \$274,616

The answers to your specific questions are as follows:

- A. The note described above is not yet due. The current payment schedule provides for payments in equal installments on March 2, 2005 and September 2, 2005.
- B. Not applicable
- C. See answer to 'A'
- D. UP has not written off any part of the payments owed to UP by the Foundation.

Documents

UP declines to provide the requested documents.

Finally, with respect to your threat to seek "formal discovery", we would regard any discovery from your client, particularly at this late date, as an abuse of STB and District Court discovery processes. Accordingly, we will vigorously oppose any such discovery and we reserve the right to seek sanctions against your client.

Very truly yours,



Robert T. Opal
General Commerce Counsel
Direct dial: 402/ 271-3072
Fax: 402/ 271-5610

cc: Thomas F. McFarland, Esq. (via Fax)
Raymond P. Mickelwright, Esq.